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No. 99-1702

IN THE

Supreme Court of the United States

STATE OF TEXAS,

Petitioner,

vs.

RAYMOND LEVI COBB,

Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"In *Michigan* v. *Jackson*, 475 U. S. 625, the Court established a prophylatic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right—even if voluntary, knowing, and intelligent under traditional standards—is presumed invalid if secured pursuant to police-initiated interrogation." *Michigan* v. *Harvey*, 494 U. S. 344, 345 (1990). The questions presented in this case are:

1. Does the *Jackson* rule apply to questioning about a second offense, to which the Sixth Amendment right to counsel has not yet attached, if (1) that offense arises from the same criminal episode as an offense for which the right has attached, but (2) the two offenses have no elements in common, (3) the time, place, and conduct are merely related, not identical, and (4) the fruit of the questioning is not material to guilt of the first offense?

2. Does the *Jackson* presumption of invalidity of waiver apply when there has been both actual consultation with counsel and a lengthy break in custody since the original assertion of the right to counsel?

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Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case raises key issues concerning the police's ability to continue to investigate a suspect's additional criminal conduct after that person is charged with one crime. The Texas Court of Criminal Appeals has given a very expansive reading of the term "closely related," allowing the right to counsel to extend to uncharged crimes. It has made this decision without regard to the interrogation's minimal effect on the representation of counsel for the charged crime, with only some simple factual relation to the previously charged crime. This hostility to interrogations is part of a growing split of authority over when and how the right to counsel extends to uncharged crimes. Because police often do not know all of the crimes the suspect has committed at the time of charging, further interrogation is often necessary. The Texas court's needless limits on good police work is contrary to the rights of victims and society which CJLF was formed to serve.

June, 2000

Respectfully submitted,

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TABLE OF CONTENTS

Questions presented i

Motion for leave to file iii

Interest of *amicus curiae* iii

Table of authorities vi

Brief *amicus curiae* 1

Summary of facts and case 1

Summary of argument 2

Argument 3

I

The scope of the "closely related" exception to the *McNeil* rule is unclear, has caused conflicting decisions, and is important 3

A. Evidence material to prior offense 4

B. Degree of relation between offenses 6

II

Whether the *Jackson* presumption of invalidity of waiver extends past release from custody, actual consultation with counsel, or both, is an important question which should be decided by this Court 9

Conclusion 12

TABLE OF AUTHORITIES

Cases

Brady v. Maryland, 373 U. S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963) 6

Carella v. California, 491 U. S. 263, 105 L. Ed. 2d 218, 109 S. Ct. 2419 (1989) 10

Commonwealth v. Rainwater, 681 N. E. 2d 1218 (Mass. 1997) 5, 8

Davis v. United States, 512 U. S. 452, 129 L. Ed. 2d 362, 114 S. Ct. 2350 (1994) 3

Douglas v. Jeannette, 319 U. S. 157, 87 L. Ed. 1324, 63 S. Ct. 877 (1943) 3

Edwards v. Arizona, 451 U. S. 477, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981) 9

In re Michael B., 125 Cal. App. 3d 790, 178 Cal. Rptr. 291 (1981) 8

Maine v. Moulton, 474 U. S. 159, 88 L. Ed. 2d 481, 106 S. Ct. 477 (1985) 4

McNeil v. Wisconsin, 501 U. S. 171, 115 L. Ed. 2d 158, 111 S. Ct. 2204 (1991) 3, 10, 11

Michigan v. Harvey, 494 U. S. 344, 108 L. Ed. 2d 293, 110 S. Ct. 1176 (1990) 3, 9

Michigan v. Jackson, 475 U. S. 625, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986) 3, 9

Minnick v. Mississippi, 498 U. S. 146, 112 L. Ed. 2d 489, 111 S. Ct. 486 (1990) 9, 11

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) 3

Oregon v. Elstad, 470 U. S. 298, 84 L. Ed. 2d 222, 105 S. Ct. 1285 (1985) 9

Patterson v. Illinois, 487 U. S. 285, 101 L. Ed. 2d 261, 108 S. Ct. 2389 (1988) 9

People v. Clankie, 530 N. E. 2d 448 (Ill. 1988) 8

People v. Storm 2000 L. A. Daily Journal D.A.R. 4059, No. D030950 (Cal. App. Apr. 19, 2000) 10

People v. Wader, 5 Cal. 4th 610, 20 Cal. Rptr. 2d 788, 854 P. 2d 80 (1993) 8

Stanley v. Illinois, 405 U. S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972) 10

United States v. Arnold, 106 F. 3d 37 (CA3 1997) 7

United States v. Barlow, 41 F. 3d 935 (CA5 1994) 10

United States v. Cooper, 949 F. 2d 737 (CA5 1991) 7

United States v. Hines, 963 F. 2d 255 (CA9 1992) 8, 10

United States v. Martinez, 972 F. 2d 1100 (CA9 1992) ... 4

United States v. Melgar, 139 F. 3d 1005 (CA4 1998) ... 4, 5

United States v. Skinner, 667 F. 2d 1306 (CA9 1982) ... 10

Whittlesley v. State, 665 A. 2d 223 (Md. 1995) 6, 7, 8

Withrow v. Williams, 507 U. S. 680, 123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993) 3

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SUMMARY OF FACTS AND CASE

The facts are stated in the opinion of the Texas Court of Criminal Appeals and the trial judge's findings on the suppression motion. On December 27, 1993, defendant burglarized the residence of Lindsey and Margaret Owings in Walker County Texas. App. to Pet. for Cert A-3. He stole a stereo system, videocassette recorder, and other things. *Ibid.* During the burglary, defendant intentionally killed 22-year-old Margaret Owings and 16-month-old Kori Rae Owings. *Ibid.* Defendant had stabbed Margaret while burglarizing the home and buried her in the woods some two to three hundred yards from the home. *Id.*, at A-9 (McCormick, P. J., dissenting). He also took Kori and buried her alive with her mother. *Ibid.*

Cobb confessed to the burglary in July, 1994. *Id.*, at A-4. The validity of this confession is not challenged. He was indicted for burglary and was appointed counsel. *Ibid.*

"Appellant made bond in the burglary case and moved to another town [Odessa]." *Id.*, at A-10 (dissent).

Over a year later, while the burglary case was still pending, Cobb confessed this murder to his father, who told the police. The Odessa police administered the *Miranda* warnings, as did the magistrate. *Id.*, at D-3 and D-7 (trial court findings 8 and 24). Cobb understood and waived his rights "and voluntarily took officers to the area where the remains of Margaret Owings and the clothing of Kori Rae Owings were found." *Id.*, at D-3 (finding 8).

Defendant was convicted of intentionally killing two people in a single criminal transaction and was sentenced to death. *Id.*, at A-1. The burglary was originally included in the murder indictment, but that allegation was abandoned before trial. *Id.*, at D-4 (findings 10 and 13). The Texas Court of Criminal Appeals reversed the conviction, holding that the Odessa interrogation violated defendant's Sixth Amendment right to counsel, as the murders were "factually interwoven with the burglary" charge, to which his right to counsel had attached. See *id.*, at A-7-A-8.

SUMMARY OF ARGUMENT

The present state of the case law has left a confusing, undefined zone around the Sixth Amendment right to have counsel present during questioning and the circumstances in which that right can be waived. Specifically, when the right to counsel has attached and been invoked for one offense, for what other offenses may police question the defendant, with a valid *Miranda* advisement and waiver? The courts have issued conflicting, inconsistent decisions regarding the nature and degree of relationship between the two offenses which will permit or prohibit police-initiated questioning. In addition, the effects of a break in custody on the *Michigan* v. *Jackson* rule requires clarification.

These are important issues in which lower courts are in conflict, warranting this Court's attention. The Court created "bright-line" rules for the purpose of providing clear guidance to police. That guidance is not yet clear in this situation.

ARGUMENT

I. The scope of the "closely related" exception to the *McNeil* rule is unclear, has caused conflicting decisions, and is important.

The police must respect the rights of suspects, but in order to do that they must know the boundaries of those rights. "Forthright observance of rights presupposes their forthright definition." *Douglas* v. *Jeannette*, 319 U. S. 157, 182 (1943) (Jackson, J., concurring in the result). Clarity is particularly important for the prophylactic rules of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and its progeny, a category which includes *Michigan* v. *Jackson*, 475 U. S. 625 (1986). See *Michigan* v. *Harvey*, 494 U. S. 344, 345, 349-350 (1990). Clarity of direction to the police is the principal justification for these rules. *Withrow* v. *Williams*, 507 U. S. 680, 694 (1993). If the rules are not clear, they fail to serve their function, and they ought to be discarded.

It will not do to lay down a vague rule and tell the police to err on the side of caution. The prophylactic rule itself exceeds the boundaries of the constitutional right. *Davis* v. *United States*, 512 U. S. 452, 458 (1994). If there is an additional gray zone around the rule, that zone creates in practice the additional layer of prophylaxis that this Court has refused to create in theory. Cf. *id.*, at 462.

When proceedings have commenced against a suspect on one charge, and he has requested and received counsel, for what other charges may the police question him if they comply with *Miranda*? We know from *McNeil* v. *Wisconsin*, 501 U. S. 171, 175-176 (1991) that a wholly unrelated offense is fair game, but

what about somewhat related offenses? The officers need to know, and at this point we can't tell them. *Maine* v. *Moulton*, 474 U. S. 159, 179-180 (1985) recognized the great importance of such investigations but failed to provide a clear answer. The Fourth Circuit made a game effort to infer a *sub silento* holding from *Moulton*, see *United States* v. *Melgar*, 139 F. 3d 1005, 1013 (1998), but rules of this nature and importance require greater clarity.

The Texas Court of Criminal Appeals in this case believed that a close factual relation alone was sufficient to invoke the exception. App. to Pet. for Cert. A-6. Its application of this rule to the facts, in its entirety, consists of the statement "his Sixth Amendment right to counsel attached to that offense [burglary], and to the capital murder offense, which was factually interwoven with the burglary." *Id.*, at A-7. Both this statement of the rule and its application are in conflict with federal court of appeals decisions.

A. Evidence Material to Prior Offense.

In *Melgar*, *supra*, the defendant urged the same rule that the Texas court adopted in the present case, *i.e.*, that factual relation was enough by itself. See 139 F. 3d, at 1014-1015. The Fourth Circuit declined to adopt this interpretation. *Id.*, at 1015. "A defendant must also demonstrate that the interrogation on the new offenses produced incriminating evidence as to the previously charged offenses. [Citation.] Courts have not applied the closely related exception in favor of a defendant absent the production of such evidence. [Citations.]" *Ibid.*

This qualification on the "closely related" exception to *McNeil* is necessary to keep the exception within the bounds of its purpose, which is to prevent circumvention of the defendant's right to counsel on the *prior* offense. See *United States* v. *Martinez*, 972 F. 2d 1100, 1105 (CA9 1992) (quoting *Moulton*, *supra*, 474 U. S., at 171). If the interrogation produces nothing of value in prosecuting the prior offense, there has been no circumvention. Excluding otherwise admissible

evidence on this basis would be a pointless obstacle to the search for truth.

Massachusetts also considers the evidentiary effect of the statements when determining whether the Sixth Amendment has been violated. In *Commonwealth* v. *Rainwater*, 681 N. E. 2d 1218 (Mass. 1997), the fact that the interrogation produced inculpatory statements of both the charged and uncharged offenses was not alone a Sixth Amendment violation. In this case, "the statement was not admitted against Rainwater in a trial for the charged offense" because he pled guilty to that crime. *Id.*, at 1225. Since the statement about the charged crime "was brief and insignificant relative to Rainwater's admissions to the [uncharged crimes] for which he was subsequently tried," *id.*, at 1226, there was no reversible error.[1] Justice Fried's opinion distinguishes cases finding a derivative, "fruit of the poisonous tree" Sixth Amendment violation in similar situations, because those cases involved deliberate attempts by the police to circumvent the right to counsel through trickery. See *id.*, at 1225. Where there was no attempt to subvert the Sixth Amendment, the fact that the interrogation does not produce significant evidence of the charged crime is decisive. See *ibid.*; cf. *id.*, at 1224, n. 5 (discussing deliberate circumvention). However, if the elicited statements prove elements of the charged and uncharged crimes, then the exception should apply to prevent the government from circumventing the Sixth Amendment right to counsel. See *Melgar*, *supra*, 139 F. 3d, at 1015 (quoting *Moulton*, *supra*, 474 U. S., at 171). Such analysis is entirely absent from the opinion in the present case.

A related question concerns the quantum of evidence needed to trigger the exception. The District Court in *Melgar* thought that the evidence had to be necessary to the prosecution of the prior case. See *Melgar*, *supra*, 139 F. 3d, at 1015

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1. The opinion is uncertain whether this is a case of no error or harmless error. See *ibid.* *Amicus* believes it is the former.

(quoting *United States* v. *Melgar*, 927 F. Supp. 939, 952 (E.D. Va. 1996)). The Court of Appeals disagreed and apparently concluded that mere relevance was enough. *Ibid. Amicus* CJLF believes that a middle-ground standard, along the lines of materiality under *Brady* v. *Maryland*, 373 U. S. 83 (1963), strikes the appropriate balance, for reasons we will develop further if certiorari is granted.

Cobb's confession to the murder was relevant to his guilt of the burglary in the broadest sense of relevance, but it was not material. The burglary case was a "done deal" on guilt, Cobb having confessed. See App. to Pet. for Cert. D-5 (trial court finding 14). Cobb's lawyer consented to the police interviewing Cobb about other events of the day in question without counsel's presence, *ibid.* (finding 15), which no competent lawyer would do if there remained any chance of acquittal.

The present case therefore presents a clear factual record on which to decide if the "closely related" exception to *McNeil* will exclude evidence in the absence of any danger of the circumvention of the Sixth Amendment that is the basis of that exception. Certiorari should be granted to resolve that important question and to resolve the division of authority presently existing on it.

B. Degree of Relation Between Offenses.

Lacking guidance from this Court, the state and lower federal courts have also developed diverse and contradictory approaches as to what degree of connection between the offenses is required. The complexity surrounding the exceptions to the *McNeil* rule starts with the basic terminology describing the relationship between the charged and the uncharged crimes. General terms such as "closely related," "inextricably intertwined," and "inextricably enmeshed" have been used to describe the relationship between the charged and uncharged crimes that supports the exception to *McNeil*. See *Whittlesley* v. *State*, 665 A. 2d 223, 235 (Md. 1995) (collecting cases). The term "closely related" is further subdivided. Some

jurisdictions "have invoked Sixth Amendment carry-over for deterrent purposes where (1) the offenses are 'closely related,' construing that phrase relatively broadly, and (2) there is evidence of deliberate police misconduct." *Id.*, at 234-235. This differs from a second line of cases, which "focus entirely upon whether the facts underlying the charged and uncharged offenses are 'closely related' . . . ." *Id.*, at 235. At least one jurisdiction goes even further, requiring the offenses to be "extremely closely related" to each other. See *United States* v. *Cooper*, 949 F. 2d 737, 744 (CA5 1991).

The differences run deeper than mere labels. Although the analysis in these cases centers on the question of whether the new charge arises from the same acts as the pending charge, see *Whittlesley*, *supra*, 665 A. 2d, at 235, both the methodology and the answers differ considerably from court to court. A sharp contrast to the lenient factual analysis in the present case is found in *Cooper*, *supra*. Cooper had been arrested and charged with aggravated robbery in state court. 949 F. 2d, at 740. Six days after counsel had been appointed, a federal agent visited Cooper in jail and questioned him about a shotgun found in his car. Cooper admitted to receiving the shotgun from a friend, but denied participating in the convenience store robbery. *Ibid.* Cooper was convicted of aggravated robbery in Texas and subsequently convicted of unlawful possession of an unregistered firearm in federal court. *Id.*, at 740-741. Despite substantial overlap in the evidence, the federal and state charges still were not "*extremely* closely related" because the two crimes involved "different conduct . . . ." *Id.*, at 744 (emphasis in original). This contrasts sharply with the present case, which relies on no more than a factual nexus between disparate crimes. See *supra*, at 4.

The courts are split over how closely related factually the crimes must be for the Sixth Amendment protection to apply to the uncharged crimes. A few courts require only "similarities of time, place, person, and conduct." *United States* v. *Arnold*, 106 F. 3d 37, 41 (CA3 1997). Most courts, however, take a

narrower view of this exception to *McNeil*. *Commonwealth* v. *Rainwater*, *supra*, 681 N. E. 2d, at 1223-1224, requires identity, not similarity, criticizing *Arnold* and citing numerous cases. See *id.*, at 1224-1225, n. 7. The present case shows that very different crimes with entirely distinct elements and very different punishments can occur during a single episode of criminal conduct. Whether disparate crimes are "inextricably intertwined," or "closely related," or even "very closely related" depends upon how narrowly this exception is construed. Lacking guidance from this Court, the courts are split, while often providing the police and lower courts with little more guidance than abstract terms such as "logically distinct." See *United States* v. *Hines*, 963 F. 2d 255, 257 (CA9 1992) (*per curiam*); *People* v. *Wader*, 5 Cal. 4th 610, 654, n. 7, 854 P. 2d 80, 104, n. 7 (1993). The confusion is understandable since "the United States Supreme Court has not yet explained just how closely related the two offenses . . . must be for the rule to apply . . . ." *People* v. *Clankie*, 530 N. E. 2d 448, 452 (Ill. 1988).

Courts, police, and prosecutors need more than general terms to guide them. It is important for them to know whether time, place, and conduct are the only relevant factors, or whether other considerations, such as the relative "seriousness of the offenses," see *In re Michael B.*, 125 Cal. App. 3d 790, 795, 178 Cal. Rptr. 291, 294 (1981), also matter. They need to know whether identity is required, as *Rainwater* says, or similarity is enough, as *Arnold* says. At least one court even doubts whether there is an exception to *McNeil*. See *Whittlesley*, *supra*, 665 A. 2d, at 233-234, n. 8.

The present case involves two very different crimes that were committed during a criminal transaction. The burglary and the murders in this case have entirely different elements and very different levels of seriousness. Since the burglary was completed when Cobb entered the house, the charged crime was committed before the uncharged murders. The murders were

different acts, and one of them occurred at a different place. Thus the time, place, and conduct are not identical.

The present case thus presents an ideal case for determining when, if ever, the charged and uncharged crimes are sufficiently closely related to suspend the *McNeil* rule. This Court can clarify the standard and specify what factors are relevant for courts to analyze and police and prosecutors to apply. Setting the standards will provide much-needed guidance and resolve important conflicts between the courts on this question.

II. Whether the *Jackson* presumption of invalidity of waiver extends past release from custody, actual consultation with counsel, or both, is an important question which should be decided by this Court.

The general rule is that rights can be waived if the waiver is voluntary, knowing, and intelligent, and the Sixth Amendment right to have counsel present during questioning is no exception. *Patterson* v. *Illinois*, 487 U. S. 285, 291 (1988). The *Miranda* procedures are generally sufficient to establish validity of the waiver. *Id.*, at 293.

Edwards v. *Arizona*, 451 U. S. 477, 484-485 (1981) established a rule that a waiver of previously invoked *Miranda* rights would not be deemed valid if it was made in response to police-initiated custodial interrogation. The purpose of the rule is to protect in-custody suspects from being badgered into waiver. *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990); *Minnick* v. *Mississippi*, 498 U. S. 146, 150 (1990). *Michigan* v. *Jackson*, 475 U. S. 625 (1986) simply imported this reasoning to the Sixth Amendment context. *Harvey*, 494 U. S., at 349.

In effect, *Edwards* creates a mandatory, conclusive presumption of coercion of the waiver, just as *Miranda* itself creates such a presumption of coercion of an unwarned custodial confession. Cf. *Oregon* v. *Elstad*, 470 U. S. 298, 307, n. 1

(1985). Mandatory conclusive presumptions are so inherently unfair that their use by the state against a defendant violates the Constitution. See *Carella* v. *California*, 491 U. S. 263, 265 (1989) (*per curiam*). It almost goes without saying that courts should be circumspect in imposing on the people the same kind of inherently unfair rule the Constitution forbids placing on the defendant. When such a presumption is created, its boundaries should be tailored to the situations where the presumed fact is highly likely to match reality. Cf. *Stanley* v. *Illinois*, 405 U. S. 645, 653-655 (1972) (presumption that unmarried fathers are unfit parents is invalid); *McNeil* v. *Wisconsin*, 501 U. S. 171, 177 (1991) (declining to adopt "contrary-to-fact presumption").

While the Fifth and Sixth Amendments rights differ in their purpose and scope, see *McNeil* at 177-178, the circumstances of coerced waiver do not. The likelihood that a particular circumstance will or will not produce a coerced waiver of the right to have counsel present during interrogation does not depend on whether the right springs from the Fifth versus the Sixth Amendment.

A number of cases have held that the *Edwards* presumption terminates upon release from custody. *United States* v. *Skinner*, 667 F. 2d 1306, 1309 (CA9 1982) (*per curiam*) is often cited for this rule, and the break in custody is sometimes called a "*Skinner* break." See *United States* v. *Hines*, 963 F. 2d 255, 257 (CA9 1992). The consensus of the circuits is "that if, after invoking her Fifth Amendment right to counsel, a suspect is released from custody, then the concerns that prompted *Edwards*' prophylactic rule are sufficiently minimized that any *Edwards* violation allegedly founded on those prior requests simply 'dissolves.' " *United States* v. *Barlow*, 41 F. 3d 935, 945, and n. 35 (CA5 1994) (*per curium*) (citing *Skinner*, *supra*; *Hines*, *supra*; *Dinkins* v. *Thigpen*, 854 F. 2d 394, 397 (CA11 1988); *United States* v. *Fairman*, 813 F. 2d 117, 125 (CA7 1987); *McFadden* v. *Garraghty*, 820 F. 2d 654, 661 (CA4 1987)); see also *People* v. *Storm*, 2000 L. A. Daily Journal D.A.R. 4059, 4061, and n. 3, No. D030950 (Cal. App. Apr. 19,

2000) (collecting cases and noting uniformity of holding). *McNeil*, *supra*, 501 U. S., at 177, recognized the break-in-custody exception to *Edwards*, albeit in dictum.

The present case is appropriate to confirm the break-in-custody rule at the Supreme Court level in holding rather than dictum, and, more importantly, to decide whether it applies to *Jackson* as well as *Edwards*, *i.e.*, to the Sixth Amendment as well as the Fifth.

If, for some reason, the Court concludes that *Jackson* differs from *Edwards* in this regard, it would be necessary to ask whether *Minnick* applies. *Minnick* held that consultation with counsel alone is not enough to terminate the protection of the *Edwards* rule. *Minnick*, *supra*, 498 U. S., at 153. If the Fifth and Sixth Amendments differ in this area, because the Fifth is about compulsion and the Sixth is about assistance of counsel, then actual consultation with counsel is more directly responsive to the Sixth and deserves greater weight in the calculus. The state's provision of counsel and defendant's actual consultation with counsel are surely relevant, and the effect on the Sixth Amendment analysis requires clarification.

"The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Id.*, at 151. That is equally true of *Jackson*. Yet that clarity and certainty are presently lacking in the frequently recurring situation presented by this case.

CONCLUSION

The petition for writ of certiorari should be granted.

June, 2000

Respectfully submitted,

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